United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig w/ affidavit of mailing

76-1324

To be argued by
STEVEN KIMELMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1324

B P/S

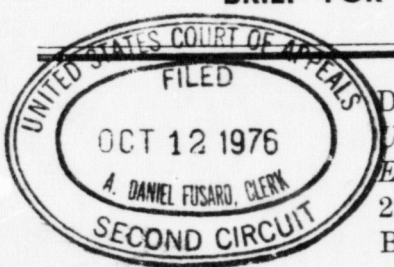
UNITED STATES OF AMERICA,
Appellee,

—against—

JACK G. SCHWARTZ and GEORGE SARKIS,
also known as "George",
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE



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Preliminary Statement

Jack G. Schwartz and George Sarkis also known as "George", appeal from judgments of conviction of the United States District Court for the Eastern District of New York (Mishler, *C.J.*) entered on July 16, 1976. Appellants were convicted, after a jury trial, on charges of using extortionate means to collect extensions of credit in violation of Title 18, United States Code, Sections 894 and 2.[1] Appellant Schwartz was sentenced to a term of three months imprisonment and a $10,000 fine. Appellant Sarkis received a sentence of three years of imprisonment. Both appellants are currently free on bail pending appeal.

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[1] Appellants were acquitted on two additional counts, one substantive charge and one count of conspiracy to violate Section 894.

On this appeal, both appellants raise the same three issues. First, appellants contend that the trial court should have declared a mistrial based on a question asked by the United States Attorney to a defense witness, which question referred to the "Mafia". Second, appellants claim that prosecutions under Title 18, U.S.C. § 894 are limited to defendants whom the United States can prove are members of "organized crime". Finally, appellants argue that their convictions are based on insufficient evidence.

Statement of the Case

A. The Government's Case

In the fall of 1974, appellant Schwartz, then president of Gaines Service Leasing Corp. (hereinafter "Gaines"), decided to expand his business to include the financing of new and used trucks. Thereafter on a relatively limited basis, Gaines would either finance a borrower's purchase of a truck or purchase for cash from a borrower, a truck already owned by that individual. In both instances, however, the financing gimmick employed was a long term lease providing for payments to Gaines at fixed monthly rate.

One of appellant Schwartz's first customers in this new venture was an individual by the name of Victor Mignoli[2] (2392-2400, 2617, 2621). Mignoli subsequently brought other independent truckers to Gaines including the two victims named in the indictment, Jack Taylor and Fred McGee. (2396). In June, 1974, with Mignoli as his guarantor, McGee borrowed $4000 from Gaines by

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[2] Mignoli also used the alias "William Cappiello". On his credit application to Gaines, Mignoli was referred to a "personal friend" of appellant Schwartz (2394-2395, 2639-2640). All references are to the trial transcript unless otherwise indicated.

selling Gaines a vehicle he owned and then leasing it back at $248 a month. (358-359). McGee paid Gaines an effective rate of interest of 24.4% a year on this loan (1584).[3] Approximately one month later, McGee borrowed a total of $55,000 from Gaines including $6500 in cash with the balance to be used to finance McGee's purchase of a new tractor-trailer.[4] (359-361).

In September, 1974, McGee also obtained a tractor-trailer from Mignoli after paying him $7800 in cash and assuming Mignoli's lease obligations to Gaines on that vehicle. McGee made several payments to Gaines on these leases but he soon began experiencing financial difficulties. Realizing his problem, McGee, with appellant Schwartz's approval, returned Mignoli's vehicle back to him, with the proviso that Mignoli would take over all of McGee's payments to Gaines. (362-367). Unknown to McGee, however, appellant Schwartz and Mignoli entered into a side agreement whereby $6500 of McGee's obligations would not be paid by Mignoli. Instead Gaines would still seek to collect this amount from McGee. (2651). On December 18, 1974, Gaines instructed its attorneys to institute legal motion against McGee including foreclosure of the mortgage held by Gaines. (2657-2660).[5] From December, 1974 until the night of April 21, 1975, no employee of Gaines or appellant Schwartz made any attempt to collect the $6500 from McGee (367-368, 2660).

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[3] The prosecutor asked the trial court to take judicial notice that the statutory criminal usury rate in New York State was then 25%. (1581).

[4] McGee's loan (lease) was secured by Gaine's (1) retaining ownership of the vehicles to be purchased and (2) taking a second mortgage on a house owned by McGee's common-law wife (2642, 2644-2655).

[5] No legal action was ever instituted against McGee by Gaines (450-451).

During the same period from September, 1974 through December, 1974, appellant Schwartz also entered into a series of transactions with the victim, Jack Taylor. In these instances, Taylor received a commission for acting as a broker between Gaines and individuals who were induced to purchase used trucks. (995-997). In January, 1975, Taylor also personally entered into a truck lease with Gaines. (999).

Unfortunately for McGee and Taylor, however, in the spring of 1975 Gaines was losing money as many of its customers began defaulting on their leases. (2443-2444). Appellant Schwartz blamed Taylor for several of these losses because he believed that Taylor had knowingly brought bad credit risks to Gaines (2625-2626). Appellant Schwartz had also stated that he was going to "fix" Fred McGee and "get blood from that Black son of a bitch" (1083).[6]

Appellant Schwartz apparently mentioned his business difficulties to a close friend of his, named Jack Cohen.[7] Among other things, Schwartz supposedly told Cohen that he was having difficulty repossessing vehicles because his repossessor, co-conspirator Grove Ebbert, had been threatened and beat up.[8] Because Ebbert refused to do any further repossessing for Gaines unless he had protection, Cohen told Schwartz that he knew of a "body-

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[6] Schwartz admitted that he believed that Taylor and McGee were "ruining" his business. (2695)

[7] Jack Cohen was so close a friend of appellant Schwartz, that following Schwartz's arrest in the instant case, Cohen lent him $100,000 on a hand shake. (902-904).

[8] Grove Ebbert was named in the instant indictment. He began cooperating with the United States, however, and was subsequently allowed to plead to a superseding information charging him with conspiracy to violate Title 18, U.S.C. § 371. Ebbert testified for the United States and was subsequently given a sentence of 3 years probation.

guard" in Puerto Rico who would come to New York to help Ebbert (905-907, 913, 2443-2444).[9] In April, 1975, Cohen arranged for the "bodyguard", appellant Sarkis, to come to New York. Sarkis was advanced a round trip airplane ticket and $200 in cash (913, 2250).

Grove Ebbert testified and flatly denied ever telling appellant Schwartz that he needed protection. On the contrary, Ebbert indicated that since repossessions were completely legal, if he needed assistance, he would simply seek out the nearest police precinct. Ebbert also stated that he had not told appellant Schwartz prior to appellant Sarkis' arrival that he had ever been threatened by anyone. (716-717).[10]

In the middle of April, 1975, appellant Schwartz decided to take action against Taylor and McGee. On Friday, April 18, 1975, Taylor was instructed to go to the Gaines office in Brooklyn, for a meeting with appellant Schwartz and unindicted co-conspirator Seymour Roth, a Gaines' vice-president. At this meeting, Schwartz told Taylor "that he made enough money off of Gaines" and therefore Taylor would have to enter into a lease for two repossessed Gaines' vehicles which Taylor had previously picked up and was gratuitously storing for Gaines on a lot he rented. Appellant Schwartz screamed at Taylor that if he did not enter the proposed lease, Schwartz would have his legs broken (1077-1079).[11]

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[9] Appellant Schwartz at trial, testified that a bodyguard was necessary because Mignoli had told him that McGee had a shotgun and would kill anybody from Gaines who attempted to repossess his equipment (1799).

[10] Evidence in Gaines' own files indicated they were previously aware that McGee no longer had any of their equipment in his possession. The United States argued that appellant Schwartz made up the story of McGee's threats to justify his later actions, (3307-3309).

[11] Appellant Schwartz admitted making these statements. (2673-2675).

Taylor, afraid and completely astonished at appellant Schwartz's threats called co-conspirator Roth the next day. Roth advised him to take Schwartz "seriously". (1084-1085, Govt's Exhibit 48, Govt's Appendix A25).

On Monday April 21, 1975, Jack Taylor, convinced that Schwartz's threat was real, returned to Gaines to sign the lease (1085, 1117). Also present at the time was Grove Ebbert (717). Appellant Schwartz informed Ebbert that Schwartz's "cousin" was coming to New York from Puerto Rico to handle some of Gaines' "collection problems". Appellant Schwartz instructed Ebbert to drive his "cousin" around without getting involved in what he was doing (720, 722). Thereafter, when Ebbert asked Schwartz why it was necessary for this individual to come all the way from Puerto Rico, Schwartz replied that he wanted to "put a scare into Fred McGee and Jack Taylor" and in addition to let Taylor know that he (Schwartz) wanted Taylor's new lease to be paid on time. (728).

That evening, appellants Schwartz and Sarkis met with Jack Cohen and Ebbert at the Golden Gate Motel in Brooklyn (724-726).[12] While at the motel, Cohen gave appellant an additional $500 or $600 in cash (919). Ebbert and appellant Sarkis thereafter left the motel together and proceeded to McGee's house in Huntington, N.Y. They arrived around midnight and appellant Sarkis went to the door and asked for McGee. McGee's

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[12] Appellant Schwartz registered appellant Sarkis at the motel as "George Schwartz" (947-948, Govt's Exhibit 43). In addition, appellant Schwartz sought to conceal his reimbursement to Jack Cohen for appellant Sarkis' air fare by sending Cohen a Gaines' check in the exact amount of ticket with an accompanying invoice labelled refund for "car insurance" (924-926, Govt's Exhibit 42).

wife yelled through the door that he wasn't home so the men left and went to a nearby bar. (729-731, 2263-2266). While at the bar, they met a former employer of Ebbert's, Richard Lanahan. Ebbert introduced Sarkis and told Lanahan that Sarkis and he were in Huntington so that Ebbert could introduce Sarkis to some of Gaines' "collection problems". Ebbert also told Lanahan privately that he was worried about why Sarkis had really been brought to New York. (731, 747-748, 952, 957, 959-961).[13]

After spending the entire night drinking and carousing in New York City, appellant Sarkis and Ebbert returned on the morning of April 22, 1975 to McGee's house. (754-759). Sarkis approached the house first and told McGee that he worked for appellant Schwartz and that he wanted $5000 cash owed by McGee to Gaines. Sarkis continued that he had to go back to appellant Schwartz with some money and that he didn't want "to hurt McGee physically". (372-381, 760). Ebbert joined the conversation and McGee was directly told that if he didn't have most of the money in two days, Ebbert and appellant Sarkis would be back to break his legs. (372-381, 760-761).[14]

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[13] At one point, Lanahan asked appellant Sarkis if Sarkis could help him collect some money from an overdue account in Puerto Rico. Appellant Sarkis replied, "What do you want me to do when I find him. Shoot him? Knife him? Kill him?". Although Lanahan positively identified Sarkis in court, appellant Sarkis denied not only the conversation but also denied ever meeting Lanahan. (752-753, 952, 957, 959-961, 2306). Appellant Sarkis' counsel failed, however, to establish any motive as to why Lanahan would lie about this meeting.

[14] After Ebbert and appellant Sarkis left, McGee immediately called a Nassau County detective, Gary Cooper, and told him what had happened. Cooper advised McGee to call the police if the men returned (383-384).

After leaving McGee's house, Ebbert and appellant Sarkis drove to Jack Taylor's residence in Setauket, N.Y. When Taylor asked why they were there, Sarkis replied that appellant Schwartz had asked him to drop in "to say hello" (763-765, 1127).[15]

The next day, April 23, 1975 McGee went to Gaines to ask appellant Schwartz why Ebbert and Sarkis had threatened him after Schwartz had previously consented to Mignoli taking over McGee's obligations. Appellant Schwartz refused to see McGee. (384-385).[16]

That same afternoon, Ebbert was instructed by appellant Schwartz to drive appellant Sarkis back to McGee's house. (765-766). When they arrived at McGee's house, someone there told them that McGee was not home so they went to a nearby bar to wait. (767). At the bar, Ebbert called appellant Schwartz to tell him that they were unable to find McGee. Schwartz then asked Ebbert to put appellant Sarkis on the phone (767-768, 776). After Sarkis returned to their table, he told Ebbert that appellant Schwartz was "tired of being made a fool of". (776). Appellant Sarkis further told Ebbert that they would burn McGee's house down to "teach him a lesson". (780). Ebbert convinced appellant Sarkis that appellant Schwartz would not get paid if McGee died in a fire. They therefore decided to burn down McGee's garage which was located next to the house. (779-780).

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[15] Ebbert told Taylor that "Jack Schwartz wants you to know that he's not going to be made a sucker of any longer" (1127).

[16] The Government argued that appellant Schwartz was not really interested in collecting the monies owed by McGee but rather wanted to hold up McGee as an example what would happen to other truckers with whom he was dealing if they did not pay Schwartz on time (3202-3203).

After stopping at a nearby gas station to pick up a can of gas, Ebbert and appellant Sarkis drove to McGee's house (781-782). Ebbert turned the car around facing the street to be ready for a quick getaway, while Sarkis went to the garage and set it on fire (783-786). Ebbert then drove appellant Sarkis to the airport where he boarded a return flight to Puerto Rico (788-790, 2318).[17] Shortly after the arson, Ebbert telephoned appellant Schwartz to inform him of what had happened at McGee's house. Schwartz's only reply to this news was "Oh really". (790-791). After the fire, both McGee and Taylor agreed to cooperate with the authorities. Shortly thereafter, McGee taped two conversations with Ebbert (401, 407). In the course of these conversations, Ebbert told McGee that if he will pay appellant Schwartz $100 a week, he won't have any more problems. (Govt's Exhibits 34 and 35, Govt's Appendix A1, A12).[18]

On May 2, 1975, McGee, wearing a hidden tape recorder, met with appellant Schwartz at Gaines' office in Brooklyn. Appellant Schwartz denied knowing about the fire. (412, Govt's Exhibit 36, Govt's Appendix A13, A24). In the same conversation, McGee expressed his concern to appellant Schwartz that McGee's grandfather, who was in a wheelchair, would not be able to get out of the McGee house in the event of another fire. Appellant Schwartz told McGee that if he made payments on time, Schwartz would *guarantee* that nobody would be back to bother him (Govt's Exhibit 36, Govt's Appendix A18-A21).

Jack Taylor also made several visits to Gaines wearing a hidden recorder and several of these taped conversa-

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[17] Appellant Sarkis received an additional $500 in cash from Jack Cohen after he returned to Puerto Rico (2684).

[18] Appellant Schwartz told Ebbert that the $100 a week payments would be satisfactory. (793-794).

tions with appellant Schwartz were received into evidence.[19]

B. The Defense Case

1. Appellant Sarkis

Appellant Sarkis testified in his own behalf. He stated that he came to New York as favor to Jack Cohen and not for any monetary gain (2176-2177).[20] Appellant Sarkis claimed his only instructions from appellant Schwartz were to accompany and protect Grove Ebbert (2178). He denied having any conversation with either Fred McGee or Richard Lanahan despite their testimony to the contrary (2188, 2279-81, 2306). Appellant Sarkis further indicated that it was Grove Ebbert's idea to commit the arson because of a personal grudge Ebbert had against McGee.[21] In fact, Sarkis claimed that he unsuccessfully tried to prevent Ebbert from starting the fire (2308-2314). On cross-examination, appellant Sarkis admitted that he was an amateur boxer and had previously been employed at various times as a union organizer, nightclub bouncer and personal bodyguard (2239, 2242, 2247). Although Sarkis denied any contact with appellant Schwartz after he returned to Puerto Rico (2318), he claimed that he did not know whether appellant Schwartz was now paying his legal fees (2346).

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[19] Conversations in which appellant Schwartz made direct or implicit threats to Taylor are included in the Govt's Appendix A26-A41. The United States respectfully directs this Court's attention to the following pages: A29, A30, A39, A40, A41.

[20] Appellant Sarkis was paid approximately $1200 for his two days in New York. This amount represented nearly a year's wages for appellant, a farmer in Puerto Rico (3013).

[21] Appellants failed to introduce any other evidence of this alleged grudge. It is also interesting to note that neither defense counsel asked a single question of McGee or Ebbert concerning this supposed grudge. (3305).

2. Appellant Schwartz

Appellant Schwartz also testified in his own behalf. He denied telling Ebbert that he brought appellant Sarkis to New York in order "to scare" Fred McGee (2667). He also denied either ordering Ebbert to go back to McGee's house on April 23 or speaking to Ebbert and appellant Sarkis on the telephone immediately prior to the arson (2682). Appellant Schwartz did admit, however, that Ebbert told him about the arson the following day (2683). He also admitted that he continued to allow Ebbert to negotiate with McGee for the repayment of the debt (2688). Appellant Schwartz explained his "guarantee" to McGee that Ebbert and Sarkis would not return to his home as simply assurance that these men would not try to "repossess" any of Gaines' equipment. (2692-2693).[22] Appellant Schwartz attempted to explain away all of the taped threats against Taylor in similar fashion. He indicated that he only meant to imply to Taylor that Gaines would take legal action against him or try to repossess Gaines' vehicles from him (2710-2715).[23]

3. Victor Mignoli

Mignoli testified that, as of the date of the trial, he still owed Gaines approximately $6000 which obligation he would not mind being relieved of. (1974). Mignoli also confirmed that he had once told appellant Schwartz that Fred McGee had a gun and would shoot anyone from Gaines who came around to collect money (1799).[24] Mignoli was

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[22] As indicated previously, Gaines knew that McGee no longer had any of their equipment. (3307-3308). The United States argued that the implicit threat in appellant Schwartz's "guarantee" was made quite clear to McGee (3044-3046).

[23] No legal action was ever instituted by Gaines against either McGee or Taylor (450-451, 3058).

[24] Mignoli claimed to have told ten other people about this "threat" but he could not remember their names (1800).

exhaustively examined both on direct and cross-examination concerning a taped conversation he had with Jack Taylor during the last week of April or the first week of May, 1975 (Defendant's Exhibit V—Government's Appendix A42-A49). During that conversation Mignoli told Taylor among other things, that Schwartz was a "legalized fucking loanshark" who would have Taylor thrown into the river if he didn't pay his debts. Thereafter, during this conversation, Taylor asked Mignoli "Who's, who's Jack [Schwartz] connected with?", and Mignoli replied "He's connected with a lot of fucking guineas". (Govt's Appendix A45).[25] Mignoli contended that he made up these statements to scare Taylor into paygin Schwartz.[26]

4. Seymour Roth

Roth was a vice-president of Gaines and appellant Schwartz's second-in-command (2020). He generally denied all complicity in the conspiracy charged and in fact, denied any knowledge of appellant Sarkis' New York visit, or its purpose (2051-2052). Although Roth had cautioned Taylor in several taped conversations offered in evidence to take appellant Schwartz seriously, he claimed that he himself was convinced that Schwartz did not intend any physical harm towards Taylor (2045-2046, 2056, 2096, 2098-2099, 2116).

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[25] It was this question and answer, appearing in Defendant's Exhibit "V" that led the prosecutor's inquiry as what was meant by the word "connected" and whether this word signified the "Mafia". It was this question, and this question alone, by the prosecutor that is alleged to be reversible error. This claim is treated in Point I, *infra*, at p. 13.

[26] After Mignoli had testified, Chief Judge Mishler, an experienced trial judge, "found" that Mignoli had been evasive and had committed perjury throughout his testimony (1865).

POINT I

The prosecutor's use of the word "Mafia" in a question to a defense witness was not error.

Appellants strenuously argue that their convictions must be reversed on the sole grounds that the prosecutor, allegedly improperly, asked defense witness Mignoli a question containing the word "Mafia". It is submitted that, in light of what actually occurred, and not the factually incorrect statement on this point by appellant Schwartz, the question was not an improper attempt by the prosecutor to interject otherwise prejudicial material into the trial. Indeed, it is submitted that the question, viewed in context, was reasonable and proper.

Since appellant Schwartz has taken the objectionable question out of its proper context and presented this Court with a distorted picture of the trial situation, the Government believes the following detailed statement is necessary. Mignoli was called as a defense witness to prove the bad character of the victims, McGee and Taylor, both of whom Mignoli had introduced to appellant Schwartz. He also testified that he had told appellant Schwartz that McGee had a shotgun which he would use on anyone from Gaines who tried to collect money from him, a conversation relied upon by appellant Schwartz in an attempt to persuade the jury that appellant Sarkis had come from Puerto Rico in order to protect Grove Ebbert.

In the course of Mignoli's direct examination, Roy Cohn, Esq., appellant Schwartz's trial counsel, introduced into evidence a transcript of a conversation between Mignoli and Taylor, which had been tape recorded by Taylor.[27] (Defendant's Exhibit V (1773, 1819)). This

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[27] Appellant Schwartz incorrectly suggests that the United States offered this conversation (App. Br., p. 10).

conversation, set forth in the Government's Appendix (A42-A49), is replete with crude attempts by Mignoli to scare Taylor into paying appellant Schwartz. For example, at one point Mignoli stated to an obviously worried Taylor, that Schwartz is "very powerful" (1720) and that if Schwartz was angry with Taylor he would have him "thrown in the fucking river" (1721). Mignoli then told Taylor that Schwartz was a "legalized fucking loan shark" (1721).[28] At one point on the taped conversation the following colloquy occurred:

> [Taylor]: Who's, who's JACK connected with?
>
> [Mignoli]: Hah?
>
> [Taylor]: Who's JACK connected with
>
> [Mignoli]: He's connected with alot of fucking guineas.
>
> [Taylor]: From where? Brooklyn?
>
> [Mignoli]: New York. New York alot of people.
>
> [Taylor]: Is that how you met him?
>
> [Mignoli]: Who SCHWARTZ?
>
> [Taylor]: Yeah.
>
> [Mignoli] In a roundabout way. I met him through guineas, Yeah. (Govt's Appendix, A45).

Mr. Cohn, after introducing this transcript, examined Mignoli as to what he meant by the above-quoted state-

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[28] Throughout his testimony concerning this tape, Mignoli repeatedly stated that he had made these statements up in order to frighten Taylor. The trial judge, however, correctly cautioned the jury that the conversation was not offered for its truth but rather to indicate the victim Taylor's state of mind and to test the credibility of Mignoli. (1829).

ments. Mignoli's response, on this direct examination, was that Schwartz was "connected" with an Italian named Eddie Clarobino (1729). The following colloquy then occurred:

> [Mr. Cohn]: Is EDDIE CLAROBINO a sinister individual?
>
> [Mignoli]: No, just an independent truck driver doing business with him [Schwartz].
>
> [Mr. Cohn]: He is a trucker, right?
>
> [Mignoli]: Right.

Mr. Cohn then asked Mignoli the following question:

> [MR. COHN]: HE IS NOT A MEMBER OF THIS UNDERWORLD THING?
>
> [MIGNOLI]: NO, FAR FROM THAT (Emphasis added, 1730).

Appellant Schwartz's brief conveniently overlooks this question, asked by his own counsel. However, it is clear that Mr. Cohn, on direct examination of his own witness, was inquiring whether the term "being connected" had "underworld" connotations.

Thereafter, on cross-examination of Mignoli, the prosecutor was diligently attempting to determine what the witness had meant by his use of several slang expressions during the conversation with Taylor. And, as the trial court found, Mignoli's responses were repeatedly evasive and perjurious (1823-1832, 1865). Thus, during the cross-examination, the prosecutor asked the witness—as had Mr. Cohn—what he meant by his statement that Schwartz was "connected". The entire colloquy was as follows:

> [Assistant U.S. Attorney]: Now, Mr. Mignoli, when Jack Taylor asked you who Jack

Schwartz is connected with, what did you understand him to mean?

[Mignoli]: Who he does business with, I guess.

[Assistant U.S. Attorney]: Is that what you understand it to mean when somebody is connected?

[Mignoli]: Yes.

[Assistant U.S. Attorney]: Isn't it a fact that being connected is common parlance for being connected with the Mafia?

[Mignoli]: I have no idea.

MR. IANNUZZI [Sarkis Defense Lawyer]: Objection, sir, to the form.

THE COURT: Objection sustained. Strike it out. The jury disregard it.

[Assistant U.S. Attorney]: When you said to Mr. Taylor that "He's connected with a lot of fucking Guineas," who did you mean?

[Mignoli]: Totally untrue.

[Assistant U.S. Attorney]: I know it's totally untrue, but whom did you mean?

[Mignoli]: Nobody in particular.

[Assistant U.S. Attorney]: What were you trying to tell Jack Taylor when you said "He's connected with a lot of fucking Guineas"?

[Mignoli]: Nothing.[29]

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[29] The testimony of Mignoli continued as follows:

THE COURT: Did you mean Italians?

THE WITNESS: Oh, yes.

THE COURT: You did mean that?

THE WITNESS: Yes. I'm Italian myself.

[Footnote continued on following page]

As the above-quoted portions of the record make clear, the witness made every attempt to avoid explaining what he had meant by the expression "connected with a lot of fucking Guineas". Mignoli, however, did admit that he had used the term to scare Taylor yet he continuously refused to state, even to the questions by the trial court, how this expression would scare anyone. Obviously, there can be no question that Mignoli was suggesting to Taylor that appellant Schwartz was involved with "organized crime", the "Mafia" or "the underworld". Indeed, Mr. Cohn, counsel for appellant, certainly realized this when, on his own direct examination, he asked Mignoli if he had intended to imply directly or indirectly that Schwartz was "a member of this underworld thing" (1730).

THE COURT: I beg your pardon?

THE WITNESS: I say, I'm Italian myself.

THE COURT: Yes, I know.

Q. Isn't it a fact, Mr. Mignoli, that you were still trying to scare Mr. Taylor when you told him that he was connected with a lot of Guineas?

A. Yes.

Q. And what did you mean, how were you trying to scare him, by saying that?

A. Maybe he'd go down and pay the man.

MR. KIMELMAN [Asst. U.S. Attorney]: I don't believe that is responsive, your Honor.

What you are saying is that that would be the result.

The question is, how would that put a scare into Mr. Taylor?

THE WITNESS: Maybe the man would go down and pay the man some money?

THE COURT: No, that is——

THE WITNESS: That's the answer.

THE COURT: That is what would happen. But the question is, by using that expression, how would you expect that to have the effect——

THE WITNESS: I have no idea.

THE COURT: You just happened to say it? It came out of thin air, is that right?

THE WITNESS: Yes.

THE COURT: All right. Go ahead. Next.

It is also significant, as seen from the above-quoted portion of the record, that the only objection to the "Mafia" question at the time was made by Sarkis' lawyer and was an objection to form, which was sustained by the court. Certainly, the lack of an immediate objection by appellant's counsel is noteworthy. Indeed, it was not until the end of the court day, well after Mignoli had completed his testimony and after another defense witness had began his testimony that appellant Schwartz's counsel, almost as an afterthought, raised an objection to the question and belatedly moved for a mistrial.

In denying this motion for a mistrial, the trial court admonished the prosecutor for asking the question. The court suggested that the prudent course would have been for the prosecutor to have first asked for a sidebar (1863-1864). The trial court, however, held in the context of the entire case that the question was not prejudicial because the taped conversation was replete with such references as "muscle", the throwing of people into the river, etc., and therefore it was obvious the witness was trying to imply to Taylor on the tape that Schwartz was "connected with the Mafia" or some other equivalent term (1867, 1877-1878).[30]

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[30] The following discussion by the trial court and the prosecutor is relevant:

> MR. KIMELMAN [Asst. U.S. Attorney]: Your Honor, Your Honor, when a man on the tape says he is "connected" you can almost take judicial notice that when somebody says you are "connected," that it means that they are connected with the Mafia.
>
> THE COURT: Mr. Kimelman, I read the question very carefully and it is only because I feel that he couldn't have meant anything else that I thought it might get by and that is about how I feel about it. (1864).
>
> * * * * *

[Footnote continued on following page]

It is submitted that the foregoing discussion completely distinguishes this case from *United States* v. *Love*, 534 F.2d 87 (6th Cir. 1976), relied on by appellants. In *Love*, it was the prosecutor who, for no apparent reason, during cross-examination of the defendant, asked the defendant if his company was part of an organization like the "Mafia." There was utterly no justification for the use of the word "Mafia" in *Love*, since unlike the instant appeal, there had been absolutely no foundation laid to permit asking the question. Moreover, and most important, Mr. Cohn, appellant's counsel, on his direct examination had interjected the subject matter now objected to into the case. Indeed, the appellant himself "opened the door" to the asking of the question by his own examination. *Cf., United States* v. *Corrigan*, 165 F.2d 641, 645 (2d Cir. 1948).

Finally, appellants fail to demonstrate how appellant was prejudiced by the question. In fact, the trial objection was sustained and the question not answered. Thus, the direct examination was left unchallenged. Moreover, the Court gave immediate cautionary instructions to the

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> THE COURT: [W]hen he said he was "connected", and he was, "connected" with Italians—I mean I am even reluctant to use the slang and I don't like it, but he himself used it and "'fellows come from Brooklyn," and he was saying, this is a part of what is called the Mafia, and I might say for the record that I happen to be one of those judges that question very seriously the existence of Organized Crime that also often picked upon by the Prosecution, the United States Attorneys and others, but in my opinion, he meant one thing. Now whether he was telling the truth or not, he certainly meant to tell Mr. Taylor that Mr. Schwartz is "connected" with Mafia.
>
> Now, I put no stock in it, I am not saying that because I believe in the truth of it, but there was no question in my mind that that is what he was trying to tell Taylor. (1865-1866).

jury which served to vitiate any prejudice that may have arisen from the mere asking of the question. It is submitted that appellant's argument is simply much ado about nothing, and it respectfully suggested that this Court should not overrule the perception of an experienced trial court, that one question, in an approximately 3000 page transcript, did not necessitate a mistrial.[31] *Cf. United States* v. *Erb*, — F.2d — (2d Cir. slip op. 49 decided October 1, 1976).

POINT II

The evidence was sufficient to sustain the jury's guilty verdict.

Appellants contend that there was insufficient evidence adduced at the trial to sustain their convictions. This claim is without merit.

The appropriate test to determine the sufficiency of a guilty verdict was stated by Judge Friendly in *United States* v. *Taylor*, 464 F.2d 240, 244-245 (2d Cir. 1972), and is the same test used by a District Court in deciding a motion for judgment of acquittal notwithstanding a guilty verdict. Thus, this Court must determine whether the evidence presented to the jury provided sufficient basis for a reasonable mind to

> ". . . fairly conclude guilt beyond a reasonable doubt. . . [I]f there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the [Rule 29] motion must be granted. If [the Court] concludes that either of two results, a reasonable doubt or no

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[31] With hindsight, the Government agrees that the better practice would have been to have requested a ruling before asking this particular question on cross-examination of this obviously hostile witness.

> reasonable doubt, if fairly possible, [it] must let the jury decide the matter." *Curley* v. *United States*, 160 F.2d 229, 232-33 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947).

Moreover, in determining the sufficiency of the evidence, conflicts between witnesses must be resolved in favor of the United States, and all the trial evidence must be examined in the light most favorable to the Government. *United States* v. *Glasser*, 315 U.S. 60, 80 (1942). A careful examination of the evidence reveals that in convicting the appellant, the jury properly determined issues of credibility, weighed the evidence and drew reasonable inferences of fact. *United States* v. *Frank*, 494 F.2d 145, 153 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974). Accordingly, the convictions must be affirmed.

In the Spring of 1975, appellant Schwartz's company, Gaines, began experiencing financial losses as many of its customers began defaulting on their obligations (2443-2444). Appellant Schwartz felt that several of these customers were "ruining" his business and he therefore decided to show them that he would not be made a "sucker of any longer" (427, 2695). Schwartz had in fact stated that, in the case of Fred McGee, he was going to "fix him" and "get blood from that Black son of a bitch". (1083). There can be no question that appellant Schwartz chose appellant Sarkis to be the instrument to "fix" Fred McGee.[32]

The evidence that Sarkis was so chosen is substantial. Sarkis, a former boxer and nightclub bouncer and now a "farmer" was brought in from Puerto Rico, according

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[32] In denying appellant Schwartz's motion for a directed verdict, the trial court found that Schwartz had "brought Mr. Sarkis in to do the strong arm work. . ." (1594).

to appellant Schwartz, to "protect" Grove Ebbert from McGee. The difficulty with this story, however, is that Ebbert testified that he had neither asked for nor needed protection in order to continue his repossession work for appellant Schwartz (716-717). On the contrary, Ebbert testified that appellant Schwartz had told him the real reason why it was necessary to have "cousin" George (Sarkis) brought in from Puerto Rico, that is, to put a "scare" into Fred McGee and Jack Taylor. (728).

Appellant Sarkis' round trip air fare cost almost $200 and in addition, he received approximately $1200 in cash as a result of his two day stay in New York. (924, 3013). Considering the fact that appellant Schwartz could have easily asked for police protection for Ebbert or simply hired a local licensed protection agency for assistance, it is not difficult to reach the conclusion that the circumstances under which appellant Sarkis was brought to New York indicated a contemplated use of extortionate means to collect the debt owed by McGee.[33]

The next day, Appellant Schwartz refused to see McGee when he came to Gaines' offices to discuss these

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[33] It is interesting to note that appellant Schwartz registered appellant Sarkis in the Golden Gate noted as "George Schwartz" ( ). Schwartz also attempted to hide his refund to Jack Cohen.

After arriving in New York on the evening of April 21, 1975, Appellant Schwartz's emissary, appellant Sarkis, wasted little time in employing these contemplated extortionate means by making a midnight visit to Fred McGee's home. Unsuccessful at locating McGee that evening, appellant Sarkis and Grove Ebbert returned the next day. Appellant Sarkis informed McGee that he didn't want to hurt him "physically" and Ebbert joined in stating that if McGee did not pay some of the money owed to Gaines in two days, that Ebbert and Sarkis would be back to break McGee's legs. (372-381, 729-731, 760-1).

threats. (384-385). Instead, Schwartz sent Ebbert and appellant Sarkis back to McGee's house. (765-766). After Ebbert telephoned Schwartz to inform him that McGee was again not home, appellant Schwartz told him to put appellant Sarkis on the phone. (767-768, 776). Thereafter Sarkis returned from the telephone and told Ebbert that appellant Schwartz was "tired of being made a fool of" (776). A short while later Sarkis told Ebbert that they were going to burn McGee's house down in order to "teach him a lesson". (780).

This conversation between appellants Schwartz and Sarkis, immediately followed by Sarkis' statements to Ebbert, surely constituted circumstantial evidence upon which the jury could have concluded, beyond a reasonable doubt, that appellant Schwartz intended that extortionate means be employed against McGee. Although appellant Schwartz argues that he did not specifically instruct Sarkis to commit arson, the circumstances surrounding the incident clearly permit the inference that some instructions were given.[34]

Moreover, after learning of the fire from Ebbert, appellant Schwartz authorized Ebbert to continue dealing with McGee in order to collect the money owed to Gaines. In fact, approximately a week after the fire, McGee went to Gaines and expressed his concern to Schwartz that no

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[34] Where an essential element of the offense has been proven by circumstantial evidence, the evidence need not exclude every reasonable hypothesis inconsistent with the guilt of the defendant. The jury may draw a particular inference in support of an essential allegation even though an opposite inference may be drawn from evidence in proof. In considering the totality of the case the jury may "color" any one fact with the other facts adduced. *United States* v. *Taylor*, 464 F.2d 240, 244-45 (2d Cir. 1972); *United States* v. *Woodner*, 317 F.2d 649, 651 (2d Cir.), *cert. denied*, 375 U.S. 903 (1963).

future violence occur. Schwartz stated that if McGee would make future payments to Schwartz, on a regular basis, he would guarantee that nobody would be back to bother him. (Govt's Appendix A18-A21).

Even assuming that Schwartz did not explicitly direct Sarkis to burn down McGee's house, the "guarantee" by Schwartz to McGee on May 2, 1975 indicated Schwartz's willingness to let McGee believe that Schwartz had authorized the arson to make certain that future payments would be made on time.[35] Such conduct on Schwartz's part, as clearly established during the trial, constitutes a violation of 18 U.S.C. 894.

Finally, it should be noted that since both appellants testified in their own behalf, the jury had ample opportunity to evaluate their explanation of the overwhelming evidence, both direct and circumstantial, which established that they had participated in extortionate means to collect the debts owed to appellant Schwartz. It is respectfully suggested that the verdict was supported by sufficient evidence beyond a reasonable doubt, and that therefore the conviction should be affirmed.

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[35] Any remaining belief that appellant Schwartz was a legitimate businessman "who was victimized" by McGee and Taylor, and who would not sanction Sarkis' actions, is quickly dispelled by a perusal of the Schwartz-Taylor conversations set forth in the Government's Appendix. Of particular interest in this regard, are the statements made by Schwartz on pp. A29, A30, A39, A40, A41 of the Government's Appendix.

POINT III

Prosecutions pursuant to Title 18, United States Code, Section 894 are not limited to "organized crime activities."

Appellants argue that the instant indictment should be dismissed because, according to their argument, prosecutions under Title 18, United States Code, Section 894 must be limited to allegations of "organized crime activities." Chief Judge Mishler rejected this claim in a pretrial memorandum. It is submitted that the trial court was correct and that appellant's position not only ignores the plain language of the statute but is directly contrary to the explicit and well-reasoned holdings of the Third, Seventh, Ninth, and Tenth Circuit Courts of Appeals.

Section 894, entitled "collection of extensions of credit by extortionate means," proscribes the following conduct: "*whoever* knowingly participates in *any* way or conspires to do so, in the use of any extortionate means (1) to collect or attempt to collect *any* extension of credit. . ." (18 U.S.C. 894[a][1]; emphasis added). This section is a part of Chapter 42, Title 18, United States Code, which is a comprehensive statute designed to prohibit "Extortionate Credit Transaction." Section 891(1) of that chapter, further defines an "extension of credit" as the making or receiving of:

> *Any* loan or to enter into *any* agreement, tacit or express whereby the repayment or satisfaction or *any* debt or claim, whether acknowledged or disputed, *valid* or invalid, and however *arising* may or will be deferred. (Emphasis added).

Moreover, both "creditors" and "debtors" are defined in § 891 as "*any person*" who gives or receives extensions of credit as previously defined (§§ 891(2) and (3)) (Emphasis added).

Thus, the plain reading of the statutory provisions, set forth above, shows that the narrow interpretation of Section 894 urged by the appellants is incorrect and that the statute is not, by its own terms, limited to organized crime.[36]

Indeed, in a somewhat analogous case, this Court recently held that the use of similarly broad language, in 18 U.S.C. § 1969, indicated a Congressional intent to regulate both legitimate *and* illegitimate businesses and was not designed by Congress to deal only with organized crime. *United States* v. *Altese*, — F.2d — (2d Cir. slip op. 4629, July 1, 1976). It is submitted that Section 894 should be similarly construed.

Additionally, and perhaps most important, Section 894 has been held by the Third, Seventh, Ninth, and Tenth Circuits to apply to extortionate transactions, whe-

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[36] Chief Judge Mishler's full opinion was as follows:

> Defendant argues that 18 U.S.C. § 894 is "primarily aimed at the abolition of organized crime loan sharking activities" (Defendant's Brief at p. 2). The statute reaches a class of conduct that includes the use of extortionate means "to collect or attempt to collect *any* extension of credit." 18 U.S.C. § 894(a)(1). 18 U.S.C. § 891 provides that "to extend credit means to make or renew *any* loan. . ." (§ 891(1)); that a creditor ". . . refers to *any* person making that extension of credit . . ." (§ 891(2)); and that a debtor ". . . refers to *any* person to whom that extension of credit is made . . ." (§ 891(3)) (emphasis added). The conduct clearly proscribed by the statute is the use of extortionate means to collect a debt regardless of how it was incurred and is not limited solely to illegal "loan sharking" operations. *United States* v. *Campanale*, 518 F.2d 352, 363 (9th Cir. 1975); *United States* v. *Annerino*, 495 F.2d 1159, 1165 (7th Cir. 1974); *United States* v. *Keresty*, 465 F.2d 36, 40 (3d Cir.), *cert. denied*, 409 U.S. 991, 93 S. Ct. 340 (1972). The motion is denied.

ther or not there is an organized crime connection. The Third Circuit, in *United States* v. *Keresty*, 465 F.2d 36, 39-41, (3d Cir. 1972), *cert. denied*, 409 U.S. 91 (1972), held that the "Extortionate Credit Transaction" Act was not limited to "loansharking" but covers all extortionate extensions of credit. Thereafter, in *United States* v. *Annerino*, 495 F.2d 1159, 1164-1165 (7th Cir. 1974), the Seventh Circuit, following *Keresty*, explicitly held that the Government need not show that there was an organized crime connection to the alleged extortionate credit transaction. The Court reasoned as follows: "Although Congress was primarily concerned with organized crime, it is clear that a means chosen to attach it was the proscription of a class of activities, that is, extortionate credit transactions. It is *not necessary* that the participants in the transaction be members of organized crime or that the particular activity has affected interstate commerce" (Emphasis added, *Id.* at p. 1165). A similar claim that the collection of gambling debts, absent proof of organized crime connection, did not come within Section 894 was expressly rejected by the Ninth Circuit in *United States* v. *Andrino*, 501 F.2d 1373 (9th Cir. 1974).

Finally, the Tenth Circuit in *United States* v. *Briola*, 465 F.2d 1018 (10th Cir. 1972), also dealing specifically with the scope of Section 894, concluded as follows:

> "It is undoubtedly true that this statute was primarily aimed at what is commonly called loansharking, but it is not limited in its terms to a loan in the sense of money passing. See, *Perez* v. *United States*, 402 U.S. 146, 91 S.Ct. 1357, 28 L.Ed. 2d 686 (1971). From our reading of *Perez* we are convinced that the real thrust of the legislation is directed to the use of extortionate means in order to collect monies which the creditors maintain are

> owing to them, regardless of whether the loan arose from a traditional type of loan or resulted from the assumption of responsibility as a result of force or threats. The relationship of the use of extortionate means of collecting extension of credit to bookmaking and similar activities was specifically noted in *Perez*. The indebtedness which is now before us is within the Act's ambit. (465 F.2d at 1021)

Because, of the clear analysis and holdings by the Circuits referred to, coupled with this Court's analogous recent *Altese* decision, further discussion is deemed unnecessary. Accordingly, the activities of appellants Schwartz and Sarkis, as set forth in the indictment, and as proved at trial, falls within Section 894 and the judgments of conviction should be affirmed.[37]

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[37] In this context, it is interesting that appellants argue in Point III of their briefs that the United States must prove they were members of "organized crime" yet they argue for a reversal in Point I of their briefs on the grounds that the prosecution's use of the word "Mafia" constitutes grounds for an automatic reversal.

CONCLUSION

The judgments of conviction should be affirmed.

Dated: October 7, 1976

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 12th day of October, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

John N. Iannuzzi, Esq.	Saxe, Bacon & Bolan, P.C.
233 Broadway	39 E. 68th Street
New York, N.Y. 10007	New York, N.Y. 10021

Evelyn Cohen

Sworn to before me this
12th day of Oct. 1976

Carolyn M. Johnson

CAROLYN M. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4618298
Qualified in Queens County
Term Expires March 30, 19 77